SUPREME COURT, U. S.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1971

No. 71-351

PSG Co., an Oregon Corporation, *Petitioner*

vs.

EL SALTO, S.A., Escuintla, Guatemala, C.A.,
Respondent

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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No.

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Respondent.

PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

To the Honorable Chief Justice of the Supreme Court of the United States and the Associate Justices of the Supreme Court of the United States:

This is a petition by PSG Co., an Oregon corporation, for a writ of certiorari to review a judgment of the United States Court of Appeals for the Ninth Circuit entered in the above case.

I. OPINIONS DELIVERED IN COURTS BELOW

The District Court did not write an opinion. Its Judgment is attached hereto as Appendix E.

The opinions of the Court of Appeals have not yet appeared in the reports. They are appended hereto, as Appendix A and Appendix B.

II. JURISDICTIONAL STATEMENT

The date of the judgment sought to be reviewed is May 12, 1971, and the time of its entry is May 12, 1971. An order modifying decision on petition for rehearing was entered on June 16, 1971. The statutory provision conferring jurisdiction on this Court to review the judgment in question is Section 1254 of Title 28 of the United States Code.

III. QUESTIONS PRESENTED

The questions presented for review by this petition are the following:

1. May a party be denied its right to a jury trial under the Seventh Amendment to the United States Constitution by a pretrial ruling of the Court which disposes of one of the factual issues in the cases? Specifically, here, the trial court determined, at the start of the trial, before any evidence had been introduced, and without there being any motion of any sort before the Court, that petitioner here, PSG Co., was guilty of a violation of the Robinson-Patman Act and that

plaintiff, respondent here, El Salto, was entitled to judgment therefor. The Court of Appeals affirmed.

2. If the agreement, prepared jointly by petitioner and respondent, was in violation of the Robinson-Patman Act as a matter of law, could respondent recover under that agreement at the same time that petitioner was being assessed treble damages for having executed the same?

3. Is supersession a question of law for the Court or a question of fact for the jury? Specifically, here although both parties agreed that it was a question of law for the Court to determine whether a later contract between them superseded, or replaced, an earlier contract, the trial court submitted this question to the jury. The decisions of the Court of Appeals is silent on this point, though it was raised on appeal.

4. Is oral testimony admissible, over objection, to vary the terms of a written contract? Specifically, here, the trial court admitted oral testimony at variance with the April, 1965 agreement between the parties, and the Court of Appeals affirmed.

IV. STATUTES INVOLVED

Involved here is an alleged violation of petitioner's right to a jury trial under the Seventh Amendment to the United States Constitution, which provides as follows:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved * * *".

Also involved here is an alleged waiver of that right to a jury trial. The pertinent portion of Rule 39, F.R.C.P. is as follows:

> "The trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury * * *."

Also involved here is an alleged violation of the Robinson-Patman Act (15 U.S.C. 13(c)), which provides as follows:

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares or merchandise * * *."

V. STATEMENT OF THE CASE

A. In the Trial Court.

By its unverified complaint (R 1-7) El Salto, a Guatemala corporation, filed suit in the United States District Court for the District of Oregon against PSG Co., an Oregon corporation, and Philip S. Greenberg. Essentially, the complaint was for monies allegedly due from the defendants for coffee shipments under a certain written contract (Appendix C hereto) be-

tween El Salto and PSG Co., dated August 19, 1965. (Judgment was in favor of Greenberg (R 178), so only PSG Co. appears here.) The complaint also claimed treble damages for alleged violation of the Robinson-Patman Act by the said August contract.

PSG Co. filed an answer and counterclaim (R. 90-93) denying the indebtedness and alleging that the coffee shipments were pursuant to an earlier written agreement between the parties of April 30, 1965. It alleged that El Salto owed PSG Co. $300,000.00 for monies advanced to El Salto by PSG Co. prior to that date of April, 1965, as recited in the said contract. Since PSG Co.'s position, basically, rests upon this April contract, it is attached to this Petition as Appendix D.

PSG Co. demanded trial by jury in its pleadings (R. 93), as well as at pretrial (Tr. 624).

A pretrial order was entered (R. 35 et seq.) in which the parties stipulated to a certain few facts (R. 37-40).

At the pretrial hearing (Tr. 543-689) the Court discussed with counsel the various issues in the case, including the Robinson-Patman issue (Tr. 551-554).

Thereafter, at the start of the trial, before any evidence was introduced, without there being any motion of any sort whatever before the Court, the Court ordered judgment in favor of El Salto on the Robinson-Patman issue.

Thereafter, jury trial commenced on the remaining issues in the case (Tr. p. 636).

Among the issues so presented to the jury was the question of whether the August contract superseded or replaced the April contract between the parties (R. 79, line 3 et. seq.), though both sides had agreed that this was a question of law for the Court to decide from an examination of the two documents (Tr. 149, 150; R 73, lines 5-7).

During the course of the trial the Court, over objection, permitted El Salto's president to testify concerning the April, 1965 contract at variance with the wording of the said document, i.e., that there had actually been no advance made in April, 1965 of $300,000.00 by PSG Co. to El Salto, contrary to the recitation in the said document.

The jury returned a verdict in favor of El Salto, against PSG Co. and in favor of Greenberg, and judgment was entered thereon (Appendix E).

B. In the Court of Appeals.

Each of the issues advanced by this petition, under heading III, above, were urged by PSG Co. in the Court of Appeals.

1. Denial of trial by jury by pretrial ruling on Robinson-Patman claim.

In its decision the Court of Appeals failed to discuss this point at all (See Appendix A attached hereto). PSG Co. thereupon filed a petition for rehearing, and in response thereto the Court of Appeals rendered a further decision (Appendix B attached hereto) wherein, in effect, it held that the trial court had not disposed of this issue before trial.

2. Illegality of contract.

The Court of Appeals rejected PSG Co.'s argument that, if the contract between the parties was illegal as a matter of law, then El Salto could not recover under such contract.

3. Supersession.

The decision of the Court of Appeals fails to discuss at all the contention that the trial court erred in submitting to the jury the question of whether the August contract superseded, or replaced, the April contract.

4. Parol evidence rule.

The decision of the Court of Appeals rejected PSG Co.'s contention that the testimony of El Salto's president tended to vary the terms of the April contract.

VI. ARGUMENT

A. DENIAL OF JURY TRIAL

1. Right to a Jury Trial.

Most respectfully, but with all the earnestness at our command, we submit that the instant decision of the Court of Appeals is contrary to every reported decision concerning the right of a litigant to a jury trial as guaranteed by the Seventh Amendment to the United States Constitution.

We respectfully submit that, if the instant decision of the Court of Appeals be allowed to stand, *any*

litigant may be deprived of his right to a jury trial by means of a pretrial ruling which disposes of one or more issues in a case which otherwise must be tried by a jury.

Specifically, here, PSG Co. demanded, in writing, trial of this lawsuit by jury at the time it filed its Answer and Counterclaim (R. 93, line 21); the jury demand is also noted on each page of that document (R. 90, 91, 92, 93). A similar demand was made orally at pretrial (Tr. 624). We submit that the pretrial ruling of the trial court against PSG Co. for treble damages on El Salto's Robinson-Patman claim was an egregious violation of its right to a jury trial.

Though PSG Co. raised this point on appeal (Appellant's Opening Brief, p. 10-11), the decision of the Court of Appeals (Appendix A) failed to discuss the same. PSG Co. filed a petition for rehearing, pointing out this omission, whereupon a further decision (Appendix B, hereto) was rendered striking part of the original decision and substituting therefor the following:

> "The District Court made findings of fact and entered judgment on the Robinson-Patman Act claim after the trial, not before. The court's pretrial ruling merely declared that, on the record at that time, there was a Robinson-Patman Act violation as a matter of law. The District Judge did not then limit the fact issues to be tried or in any way curtail Defendant's proof. The agreed facts and the facts later adduced at the trial adequately established that PSG Co. acted as a buyer and that it received commissions from El Salto."

The record, however, is incontrovertibly to the contrary. The record shows that this issue was removed from the case by the trial court prior to trial:

> "But there is an issue that seems to me *must be decided right now,* and that is what I have been working on last evening, and that is the Robinson-Patman Act thing. It just seems to me that in order for this trial to proceed any further, *that matter will have to be resolved at this time.*" (Tr. p. 9, lines 8-12)
>
> "But after reading the briefs and the cases and the other material, I am convinced that we have as a matter of law a violation of Section 2(c) of that act, and that as a matter of law the plaintiff is entitled to three times the admitted commissions withheld. I am reserving, however, the question of whether or not this entitles the plaintiff to a judgment against Mr. Greenberg, *but I am not reserving the question that it does entitle them to a judgment against PSG Company.*" (Tr. p. 10, lines 16-24)
>
> "Take a look, gentlemen, at your special interrogatories. Take a look at the special interrogatories which you submitted. *Which of those issues have been eliminated as a result of the ruling on the Robinson-Patman,* Mr. Carlsen?"
>
> "Mr. Carlsen: No. 2, your Honor." (Tr. 30, lines 10-15) (Emphasis added.)

Contrary to the statement that the Robinson-Patman decision was based on evidence adduced during the trial, *the judgment specifically recites:*

> "Prior to the impaneling of the jury, the court considered plaintiff's motion for a judgment on

> its Robinson-Patman Act claim as a matter of law based on the agreed facts. Arguments were made, following which the court orally ruled in plaintiff's favor on such claim and made and entered its findings of fact and conclusions of law with respect thereto." (R. p. 99, line 32 to p. 100, line 4.)

Contrary to the above recitation, the fact of the matter was that there was no such pretrial motion for judgment, nor any other pretrial motion, however denominated, before the Court. The reporter's transcript of the pretrial hearing (Tr. 543-632) and the minutes of the Court (R. 227) may be searched in vain for even an *oral* motion of the kind described in the judgment. Plainly and simply, the trial court disposed of this issue *on its own motion* before trial. Though this gross procedural error, which deprived PSG Co. of any right to respond to such non-existant motion was pointed out in Appellant's Opening Brief (p: 9-10), the original decision of the Court of Appeals is silent with regard thereto.

The Court of Appeals, however, in its *original* decision (Appendix A), noted:

> *"On the basis of a pretrial stipulation of facts,* the court ruled that PSG had violated sec. 2(c) of the Robinson-Patman Act by claiming agency commissions under the August 19th contract." (Emphasis added.)

Since this portion of the appellate decision was not modified by the later Order on Petition for Rehearing, we must assume that it constitutes the law of the case.

Regardless of the semantics, the ineluctable, inescapable fact remains that PSG Co. was denied a jury trial on this issue, and was indeed denied any trial at all by means of such pretrial ruling.

2. Waiver of Jury Trial.

The amended decision of the Court of Appeals (Appendix B) states that PSG Co. "explicitly waived its right to jury trial on the Robinson-Patman Act claim."

The record, again, is clearly to the contrary.

At the pretrial hearing counsel for PSG Co. explicitly stated that the Robinson-Patman claim involved fact questions for the jury (Tr. 551), that there could be no "per se" violation here on the basis of the contract (Tr. 10, lines 7-10). El Salto argued exactly the same in its Trial Brief Number One, where at page 2, lines 10-16, it said:

> "With respect to plaintiff's claim for treble damages in the amount of $15,176.13, plus costs and attorneys fees, this claim raises a fact question for the jury whether Greenberg acted in an illegal dual capacity as both agent and principal."

Counsel for PSG Co. argued at the pretrial (Tr. 553-554) that the Court should, as a matter of law, dismiss the Robinson-Patman claims because of El Salto's failure to offer evidence of facts indispensible to a recovery under that Act, but at no time whatsoever did it waive its right to a jury trial on the question of whether it had violated the Act.

Such waiver can be made *only* in writing or by oral stipulation made in open court and entered in the record. F.R.C.P., Rule 39. No such writing appears here, nor any such entry in the record.

The *contrary* appears; *after* the discussion of the Robinson-Patman matter had been concluded at the pretrial hearing (Tr. 551-554) the trial court itself stated that the matter involved fact questions (Tr. 619, lines 14-17) and specifically commented on its assumption that PSG Co.'s president would want a jury trial. To that comment counsel for PSG Co. responded,

> "He would like his day in court in front of the jury, I think, on whatever comes up." (Tr. p. 624, lines 3-5)

Nowhere did the trial court even suggest that PSG Co. had "waived" a jury. Even El Salto, in its Brief before the Court of Appeals did not attempt to argue that PSG Co. had "waived" its right to a jury trial. On the contrary, El Salto simply contented itself with praising the "expeditious and efficient way" the trial court disposed of this matter (Appellee's Reply Brief, pages 6-7), arguing that:

> "Clearly, Judge Belloni [the trial judge] did this in an effort to eliminate one issue as to which there was really no material dispute of fact. None was brought to the Court's attention when it made its ruling (Tr. 9-11). Such efforts to simplify the issues, speed up the proof and eliminate from the jury's concern matters which are essentially legal should be admired. Appellant's grievance—that he learned that El Salto's position on the Robinson-

> Patman issue commended itself to the Court before trial, rather than later—is no grievance at all. Indeed, courts should be encouraged to such salutary and sensible narrowing of trial disputations." (Appellee's Reply Brief, p. 9)

Why bother with a trial at all, if the Court is empowered to "eliminate" jury trials by reviewing the files and, without any motion whatsoever before it, dispose of a substantial part of the case? Yet this is precisely the procedure approved by the instant decision of the Court of Appeals.

3. The "Agreed Facts".

Both the judgment (R. 100, line 1) and the decision of the Court of Appeals (Appendix A) attempt to justify the pretrial ruling on the basis of the "Agreed Facts". Those agreed facts appear as part of the pretrial order (R. 37-40). The *only* facts appearing therein pertinent to the Robinson-Patman matter are the following:

> "7. On or about April 30, 1965, a document was signed, a copy of which is attached hereto marked Exhibit D and incorporated herein." (R. 38, lines 13-15)
>
> "9. On or about August 19, 1965 PSG entered into a contract with El Salto whereby it agreed to act as sole sales agent for the sale of refined sugars, raw sugars and green coffee from the 1965/1966-1968/1969 El Salto crops. El Salto was to pay PSG for its services a commission of 2½% of the net sales price of the sugar and/or coffee FOB and stowed Guatemala. This contract established a minimum commission of

> $25,000.00 per crop year and was re-executed in Spanish on September 1, 1965." (R. p. 38, lines 24 to p. 39, line 1)
>
> "14. PSG has withheld the sum of $101,415.00 from coffee shipments made by El Salto pursuant to the Confirmation of Purchases described in No. 11 and No. 12, above, based upon PSG's contention that it was and is entitled to do so under the contract of April 30, 1965." (R. 39; lines 29-33)

We repeat, these are the *only* facts agreed to between the parties pertinent to the Robinson-Patman matter. We respectfully submit that it is inconceivable that such facts could show a violation of the Robinson-Patman Act.

The following reasons alone make that clear:

a. The Act prohibits *payments,* or *receipts,* of commissions between buyer and seller; it does *not* prohibit the execution of certain kinds of contracts. No payment of any sort appears in the agreed facts. It does here appear that PSG Co. retained certain monies under a claim of right, pursuant to the *April,* 1965 contract, for monies advanced *before* that date by PSG Co. to El Salto. Since the essence of a Robinson-Patman violation is the payment or receipt of money, and *no* payment or receipt appears in the agreed facts, no violation can be there found.

Even *after* the trial there was no evidence of any payment of commissions whatsoever. El Salto simply computed 2½% of total sales and called it commissions! (R. 31-33) (The correctness of the *computation* was thereafter stipulated. Tr. 367.)

b. El Salto claimed the PSG Co. violated the Robinson-Patman Act by the *August,* 1965 contract (R. 43, lines 3-8). But that contract was not even before the Court in the agreed facts! only a brief description of it, in paragraph 9, a perfectly proper agency agreement. As a matter of law, that agreement is *not* in violation of the Robinson-Patman Act.

c. The agreed facts do *not* show whether PSG Co. was actually a buyer or merely an agent. See *Western Fruit Growers v. F.T.C.*, 322 F.2d 67, 68-69 for some of the fact issues involved in such a question.

d. No evidence of damages appears in the agreed facts, yet a plaintiff must plead and prove his *actual damages* before he is entitled to a money judgment under the Robinson-Patman Act. See host of cases assembled at note 108, 15 U.S.C.A. sec. 16; *Clark Oil Co. v. Phillip Petroleum*, 148 F.2d 580. The amount of alleged illegal payments is no evidence at all of a plaintiff's actual damages. *Enterprise Industries v. Texas Co.*, 240 F.2d 457, 460.

e. The agreed facts show that certain coffees were shipped by El Salto to PSG Co. subsequent to the execution of both the April and August contracts; they do *not* show that the same were shipped under the August contract, the one sued on by El Salto. They *do* show that PSG Co. retained monies for such coffee shipments under a claim of right pursuant to the *April* contract.

f. If it be contended that the April and August contracts, taken together, show a Robinson-Patman violation, at least two answers appear: first, El Salto

claimed a violation only by virtue of the August contract, and, second, the jury found that the April contract was superseded and *nullified* by the later August contract (R. 100, lines 23-26).

g. The August contract, under which El Salto claims a Robinson-Patman violation, states (Appendix C) that the commissions are for services rendered by PSG Co. to El Salto. This is perfectly proper. *F.T.C. v. Henry,* 363 U.S. 166, 175, 4 L.Ed.2d. 1124; *F.T.C. v. Washington Fish Co,* 252 F2d 595; 15 U.S.C. 13(c).

For all the foregoing reasons, we respectfully submit that the instant decision of the Court of Appeals finds no support in the record. As is discussed below under the heading, "Reasons for Granting the Writ", we believe it is also in conflict with applicable law on the subject.

B. ILLEGALITY OF CONTRACT

Both in the trial court and in the Court of Appeals PSG Co. contended that, if the contract between the parties was illegal under the Robinson-Patman Act as a matter of law, then El Salto could not recover thereunder at the same time that PSG Co. was being assessed treble damages for having entered into such contract.

The Court of Appeals specifically found that in this case,

> "the alleged antitrust violation is inherent in the very contract sued upon by El Salto." (Appendix A)

Since the subject contract was prepared by the two parties jointly (Tr. 310, 344, 418) it was not "forced" on one party by the other; certainly no disparity of bargaining strength appears in the record. It would seem to follow, under the recent ruling of this Court in *Perma Life Mufflers v. International Parts,* 392 U.S. 134, 20 L.Ed.2d 982 that, although the technical doctrine of "pari delicto" is not a defense to an antitrust claim that the "complete involvement and participation" of El Salto in these transactions would prevent its recovery under a Robinson-Patman claim.

In the alternative, if the contract itself is so tainted as to justify treble damages against PSG Co. simply because it *signed* the document—without any evidence of payments thereunder—how can El Salto, the other party to that contract, recover thereunder?

In no case we have been able to find has a Court ever permitted a plaintiff simultaneously to recover treble damages under Robinson-Patman *plus* recovery for goods sold. The clear suggestion in *Bruces Juices v. American Can Co.,* 330 U.S. 743, 757, 91 L.Ed., 1219, 1229, is that a party cannot have both remedies. Further, this Court there said at 330 U.S. 743, 756:

> "If, in order to prove his own case, a plaintiff proves his violation of law, then no Court will aid the plaintiff to recover."

In *Kelly v. Kosuga,* 358 U.S. 516, 3 L.Ed.2d 475, this Court held that illegality under Robinson-Patman was not a bar to recovery for costs of goods sold unless judicial recognition would work to enforce

"the precise conduct made unlawful by the Act." See also *Lewis v. Seanor,* 382 F.2d 437, 441. Since it is here held that the very execution of the instant contract by PSG Co. is in violation of the Act it would seem to follow necessarily that that contract could not be judicially enforced.

See also *Continental Walt Paper Co. v. Louis Voight & Sons Co.,* 212 U.S. 227, 53 L.Ed. 486; *A. B. Small Co. v. Lamborn,* 267 U.S. 248, 69 L.Ed. 597.

C. SUPERSESSION

In both the trial court and in the Court of Appeals PSG Co. contended that the question of whether the August, 1965 contract superseded, or replaced, the earlier April, 1965 contract, was a question of law for the Court to decide.

Both parties to the suit in the trial court agreed that the question was one of law and not a question of fact for the jury (Tr. 149, 150 R. 73, lines 5-7).

The trial court, however, submitted the question to the jury. The jury found that the later contract superseded the earlier (R. 79, lines 13-17) but that PSG Co.'s president undertook obligations under the earlier contract! (R. 82, lines 26-29).

Though this error was presented, extensively, to the Court of Appeals (Appellant's Opening Brief, p. 18-24), no mention thereof appears in the decision of that Court.

We submit that, as a matter of law, it is clear that the later contract could not supersede or nullify the earlier for a variety of reasons:

a. The *subject matter* is different in the two contracts. The earlier one is for the sale of coffees; the later one simply creates an agency. The first, therefore, covers such things as "seller", "buyer", "packaging", "shipment", "delivery", "marine insurance", "price", "payment", "taxes", "captation", "force majeure". The later agency contract obviously is not concerned with such matters.

b. *No inconsistency* whatsoever appears between the two documents. Since they relate to different subject matters they *cannot* be inconsistent. In the only areas in which they overlap, i.e., allowance of 2½% commission and applicability of Guatemala and Oregon laws, they are the same.

c. There is unequivocal evidence that the later contract did *not* replace the earlier (Tr. 281, 282, 343); there was *no* evidence to the contrary.

d. The matter of the $300,000.00 advance made by PSG Co. to El Salto, as recited in the earlier contract could not have been abrogated by the later contract for it is not even mentioned therein. Of the utmost importance to PSG Co., of course, was the fact that the April, 1965 contract contained an unqualified acknowledgment of indebtedness by El Salto to PSG Co. in the amount of $300,000.00 (Appendix D). Since no reference to the same appears in the later contract there could not have been a "supersession" as a matter of law.

We submit that the submission of this question to the jury was reversible error. See *N. L. R. B. v. International Union*, 323 F.2d 545, 546; *Bank of Fairbanks v. Kaye*, 227 F.2d 566.

D. PAROL EVIDENCE

As discussed above, the April 30th contract, upon which PSG Co. relies, unequivocally acknowledges the existence, as of that date, of a $300,000.00 debt from El Salto to PSG Co., as well as the method of repaying the same. Over objection based on the parol evidence rule (Tr. 151-153, 413-414), El Salto's president was permitted to testify that there was no such debt (Tr. 413-414).

The trial Court justified the introduction of the disputed evidence upon the ground that PSG Co.'s president had testified concerning antecedent transactions which resulted in the April contract and that, therefore, El Salto should be permitted to do so.

On appeal PSG Co. (Appellant's Opening Brief, pp. 25-30) pointed out the obvious fact, that the testimony of PSG Co. was not in violation of the parol evidence rule because it was supportive of the contract whereas El Salto's testimony was in flat contradiction thereto.

The Court of Appeals justified the subject testimony on the grounds of "latent ambiguity" (Appendix A). We submit that such determination is not supported by either the law or the facts.

The pertinent part of the April, 1965 contract reads as follows:

> "Payment for coffee to apply against $300,000.00 advance made by PSG Co. to El Salto, S. A. until such advance, and interest due, has been liquidated." (Appendix D)

The disputed testimony by El Salto denied that there was any such debt whatsoever in April, 1965 (Tr. 413-414).

We respectfully submit that it is difficult to imagine a clearer violation of the parol evidence rule.

VII. REASONS RELIED ON FOR ALLOWANCE OF WRIT

As is discussed in detail below, petitioner PSG Co. respectfully contends that the instant decision of the Court of Appeals is in conflict with decisions of other Courts of Appeal on the same matter; that the same determines an important state question in a way in conflict with applicable state law; that the same decides an important question of federal law which has not been, but should be, settled by the Supreme Court; that the same decides a federal question in a way in conflict with applicable decisions of the Supreme Court; and that the same has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of the Supreme Court's power of supervision.

We submit that each and every one of the foregoing grounds for allowance of a writ appears in this case, as follows:

A. The instant decision is in conflict with decisions of other Courts of Appeals in denying to PSG Co. its right to a jury trial on the Robinson-Patman issue. See *King v. United Ben. Fire Ins. Co.*, 377 F.2d 728; *Marks Food Corp. v. Barbara Ann Baking Co.*, 274 F.2d 934; *Costen v. Pauline's Sportswear, Inc.*, 391 F.2d 81.

The instant decision is in conflict with decisions of other Courts of Appeals in holding that PSG Co. waived its right to a jury trial under Rule 39, F.R.C.P. See *Collins v. Government of Virgin Islands,* 366 F.2d 279; *Christenson v. Diversified Builders,* 331 F.2d 992; *Rodenbur v. Kaufmann,* 320 F.2d 679.

The instant decision is in conflict with decisions of other Courts of Appeals in permitting the jury to decide the issue of supersession. See *N.L.R.B. v. International,* 323 F.2d 545, 546; *Bank v. Kaye,* 227 F.2d 566.

The instant decision is in conflict with decisions of other Courts of Appeals in permitting judgment in favor of El Salto under the Robinson-Patman Act without any showing of damages. See *Clark v. Phillips,* 148 F.2d 580; *Enterprise Ind. v. Texas Co.,* 240 F.2d 457, 460; annotations at note 108, 15 U.S.C.A., sec. 16.

B. The instant decision decides an important state question in a way in conflict with applicable state law in admitting parol evidence to vary the terms of a written contract. See *Weatherford v. Weatherford,* 199 Oregon 290, 257 Pac.2d 263, 265; *Marks v. Twohy Bros. Co.,* 98 Oregon 514, 194 Pac. 675, 680; *Kane v. Kane,* 134 Oregon 79, 291 Pac. 785; *Dorsey v. Tisby,* 192 Oregon 163, 234 Pac.2d 557; *Taylor v. Wells,* 188 Oregon 648, 217 Pac.2d 236; *Fry v. Ashley,* 228 Oregon 61, 363 Pac.2d 555. Similarly it conflicts with applicable Oregon decisions barring evidence that the contract was but a sham, not to be performed but to be used to mislead a third party. See *Kergil v.*

Central Oregon Fir, 213 Oregon 186, 323 Pac.2d 947; *Mock v. Bell Motors,* 234 Oregon 224, 380 Pac.2d 922; *Carolina Casualty v. Oregon Auto Ins. Co.,* 242 Oregon 407, 408 Pac.2d 198.

C. The instant decision decides an important question of federal law which has not been, but should be, settled by the Supreme Court, namely, the question of whether a party may simultaneously recover treble damages under the Robinson-Patman Act *plus* the value of goods allegedly sold.

D. The instant decision decides a federal question in a way in conflict with applicable decisions of the Supreme Court in that it denies to PSG Co. its right to a jury trial on the issue of an alleged violation of the antitrust statute. See *Beacon Theaters v. Westover,* 359 U.S. 500, 504, 3 L.Ed.2d 988, 994.

The instant decision decides a federal question in a way in conflict with applicable decisions of the Supreme Court in that it permits a party to recover under an illegal contract. See *Continental Wall Paper Co. v. Louis Voight & Sons Co.,* 212 U.S. 227, 53 L.Ed. 486; *A. B. Small Co. v. Lamborn,* 267 U.S. 248, 69 L.Ed. 597; *Bruce's Juices v. American Can Co.,* 330 U.S. 743, 756, 91 L.Ed. 1219, 1228; *E. Bement v. Natl. Harrow Co.,* 186 U.S. 70, 40 L.Ed. 1058; *Dr. Miles Medical Co. v. John D. Park,* 220 U.S. 373, 55 L.Ed. 502; *D. R. Wilder Mfg. Co. v. Corn Products Ref. Co.,* 236 U.S. 165, 59 L.Ed. 520.

E. The instant decision so far departs from the accepted and usual course of judicial proceedings and so far sanctions such a departure by a lower court

as to call for an exercise of the Supreme Court's power of supervision in that it permits, in a jury case, summary judgment against PSG Co. for a Robinson-Patman violation before trial ever commenced and without there even being a motion of any sort before the Court. See *Hodges v. Easton,* 106 U.S. 412, 27 L.Ed. 169; *Aetna Ins. Co. v. Kennedy,* 301 U.S. 389, 81 L.Ed. 1177; *Guerrero v. American-Hawaiian Steamship Co.,* 222 F.2d 238, 243.

VIII. CONCLUSION

For all of the foregoing reasons Petitioner PSG Co. prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in the above-entitled case.

Dated, San Francisco, California,
August 19, 1971.

ARTHUR H. CONNOLLY, JR.,
Attorney for Petitioner.

SULLIVAN, ROCHE & JOHNSON,
GERALD J. O'CONNOR,
Of Counsel.

(Appendices Follow)

Appendix A

United States Court of Appeals
for the Ninth Circuit

El Salto, S.A., Escuintla, Guatemala, C.A., *Plaintiff-Appellee,* vs. PSG Co., *Defendant-Appellant.*	No. 23,708
El Salto, S.A., Escuintla, Guatemala, C.A., *Plaintiff-Appellee,* vs. Philip S. Greenberg, *Defendant-Appellant.*	No. 23,709
El Salto, S.A., Escuintla, Guatemala, C.A., *Plaintiff-Appellee,* vs. Philip S. Greenberg, *Defendant-Appellant.*	No. 23,715

[May 12, 1971]

On Appeal from the United States District Court
for the District of Oregon.

Before: Hamley and Merrill, Circuit Judges, and
Thompson, District Judge*

*Honorable Bruce R. Thompson, United States District Judge for the District of Nevada, sitting by designation.

MERRILL, Circuit Judge:

El Salto, S.A., a Guatemalan company engaged in the production, processing and marketing of raw and refined sugar and green coffee, instituted this action against PSG Co., an Oregon corporation, and Philip S. Greenberg, an Oregon citizen who is the president, general manager and sole stockholder of PSG, to recover the price of coffee shipments made to PSG, damages for breach of contract, and treble damages for PSG's alleged violations of §2(c) of the Robinson-Patman Act, 15 U.S.C. §13(c) (1964).

Beginning in 1963, El Salto entered into several contracts with Greenberg and PSG to effect the marketing of its coffee and sugar exports in the United States. Initially Greenberg dealt directly with El Salto. On August 1, 1963, Greenberg organized PSG; thereafter he conducted all his business with El Salto through PSG.

On April 30, 1965, PSG and El Salto executed what was in form a sales contract that obligated PSG to purchase a minimum of 6,000 bags of El Salto's coffee from the 1965-1966 crop year. The agreement designated PSG as both the buyer and "sole and exclusive agent" in the United States for El Salto and provided that El Salto would pay PSG a commission of 2½ per cent of the sale price of the coffee sold under the contract.

On August 19, 1965, El Salto and PSG signed a new agreement that designated PSG as the exclusive sales agent for El Salto's coffee and sugar exports for the crop years 1965-1966 through 1968-1969. El Salto

agreed to pay PSG a 2½ per cent commission on sales, and guaranteed PSG a minimum annual commission of $25,000 per year for services rendered to El Salto.

PSG subsequently negotiated eight sales of El Salto coffee to American purchasers. When PSG declined to forward some $100,000 in receipts to El Salto, claiming that it was entitled to do so under the April 30th contract, El Salto instituted this suit in federal district court.

After the trial of El Salto's common law claim for the price of coffe shipments made to PSG, the jury entered special findings of fact that PSG had retained $105,286.61 on the coffee contracts; that Greenberg had unjustifiably retained $2,187.39 on one of the coffee sales; that the August 19th agreement superseded and nullified the April 30th agreement; that (contrary to contentions of PSG, later discussed) there was no $300,000 advance made by PSG to El Salto prior to April 30, 1965; that PSG was estopped from claiming a right to withhold monies under the coffee contract because it had issued a check in partial payment of the sums allegedly withheld; that Greenberg breached the obligations he undertook as agent to El Salto under the April 30th contract; and that Greenberg should not be held personally liable for the debts of PSG Co. Accordingly, the District Court entered judgment for El Salto for damages and the amount of coffee sales receipts withheld by PSG and Greenberg.

On the basis of a pretrial stipulation of facts, the court ruled that PSG had violated §2(c) of the Rob-

inson-Patman Act by claiming agency commissions under the August 19th contract. Treble damages were awarded to El Salto based on a stipulation that the amount of commissions was $5,058.71.

I. *Case No. 23,708*

In this case PSG appeals from the District Court's award of treble damages for violation of the Robinson-Patman Act and from the imposition of contract liability.

A. *The Robinson-Patman Act Claim*

Section 2(c) of the Robinson-Patman Act, 15 U.S.C. §13(c) (1964), prohibits parties to a sales contract from granting or receiving a "commission, brokerage * * * or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods."

The agreed facts support the District Court's determination of liability. On appeal PSG contends that it was not acting as a buyer in the transactions for which commissions were paid and that the commissions it received were for services rendered. These contentions we reject. They were not tendered as issues at trial and are not borne out by the record.

Before the District Court, PSG contended that El Salto's Robinson-Patman Act claim was barred because El Salto was *in pari delicto*. Since PSG has abandoned this argument on appeal, we need not discuss it here. The record in this case fails to support PSG's argument that there was such a "truly complete involvement and participation in a monopolistic

scheme" by El Salto as would provide a basis for barring the Robinson-Patman Act claim apart from the idea of *pari delicto*. *See Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 140 (1968).

B. *The Contract Claim*

On appeal from the imposition of contract liability, PSG urges that the trial court erred in rejecting its claim that the April 30th contract afforded it a right to withhold coffee sales receipts and apply them against a "$300,000 advance" it allegedly had made to El Salto.

The contract provides:

> "Payment for coffee to apply against $300,000.00 advance made by PSG Co. to El Salto, S.A. until such advance, and interest due, has been liquidated. Balance of funds after liquidation of $300,000.00 advance, less commission and expenses, to be remitted to El Salto, S.A. upon completion of contract."

El Salto contended that any advance made was fully liquidated. PSG contended otherwise. The court admitted oral testimony for the purposes of identifying the advance referred to by the agreement and establishing the facts of payment. The testimony presented by El Salto indicated that the reference to an advance was inserted in the contract only to facilitate a future Oregon bank loan to Greenberg, who on July 29, 1965, in turn loaned the money to El Salto's affiliate Orion Enterprises. It is not disputed that these loans had been liquidated long before PSG attempted to justify

its retention of coffee monies on the basis of a purported right to set-off.

PSG, however, argues that the District Court erred in refusing to apply the stringent Oregon parol evidence rule, *see, e.g., Kergil v. Central Oregon Fir,* 323 P.2d 947 (Ore.S.Ct. 1957), to exclude the testimony admitted at trial to show that the April 30th agreement in fact referred to a future loan, since liquidated, that was made to El Salto's affiliate.

We disagree. On its face the contractual language in question simply provides for the manner in which sums due under the contract were to be applied. El Salto's ultimate factual contention would not vary the terms of the agreement in this respect: El Salto simply claimed (and the jury found) that no unliquidated advance remained against which payments were to be offset.

PSG contends, in effect that the language in question not only provides for the disposition of sums due but also constitutes an indisputable acknowledgment by El Salto of a then-existing indebtedness. But the contract is not so phrased and the language in question seems far too imprecise to accommodate such a construction. At the very least the contract is ambiguous in this respect and a jury question was presented as to whether the parties intended to acknowledge an existing debt.

Oregon law, of conceded applicability here, clearly permits extrinsic evidence where latent ambiguity is demonstrated. *See, e.g., Doherty v. Harris Pine Mills,* 211 Ore. 378, 315 P.2d 566, 574 (1957). As we stated

in *Standard Oil Co. of California v. Perkins*, 347 F.2d 379, 386 (9th Cir. 1965), "paramount consideration should be given the modern rationale and purpose of the parol evidence rule to provide reasonable stability to the meaning of words used by the parties in their contracts. * * * This is but a variant of and wholly comports with the court's first duty of effectuating the parties' mutual intention. * * *"

Viewed in light of these considerations, we feel that the challenged testimony did not contradict the terms of the April 30th agreement. We find no error in the trial court's determination that PSG did not have a right to set off $300,000 against El Salto.

As a second defense to contract liability PSG contends that if the treble damage award entered against it was proper, then the District Court erred in permitting recovery on a contract that contained a violation of §2(c) of the Robinson-Patman Act.

We note that the circumstances in which an alleged antitrust violation may become a defense in a private contract action are narrowly circumscribed. In *Bruce's Juices v. American Can Co.*, 330 U.S. 743 (1947), the Supreme Court held that a seller's action for the purchase price of goods sold would not be barred simply because he violated §2(a) of the Robinson-Patman Act by giving third persons a greater discount than he gave the buyer. The Court noted that the antitrust violations complained of were not inherent in the particular contract in suit, and that the plaintiff did not have to prove his violations of antitrust law in order to establish a right to recover under the contract. *Id.* at 755-56.

This case differs from *Bruce's Juices, supra,* in that the alleged antitrust violation is inherent in the very contract sued upon by El Salto. But we do not find this circumstance dispositive. The Supreme Court has ruled that a Sherman Act violation is not an affirmative defense to a contract suit, even where the violation is inherent in the contract sued upon, so long as judicial enforcement of the contract would not be enforcing the precise conduct made unlawful by the Act. *Kelly v. Kosuga,* 358 U.S. 516, 519-20 (1958). *See Lewis v. Seanor Coal Co.,* 382 F.2d 437, 441 (3d Cir. 1967). We think that, regardlless of the ultimate outcome of the Robinson-Patman Act action, PSG's Robinson-Patman Act defense to the contract action must be rejected under the same principle that was enunciated by the Court in *Kelly v. Kosuga, supra,* at 520-21: "Past the point where the judgment of the Court would itself be enforcing the precise conduct made unlawful by the Act, the courts are to be guided by the overriding general policy * * * 'of preventing people from getting other people's property for nothing when they purport to be buying it.'"[1] Neither the language nor the legislative history of §2(c) of the Robinson-Patman Act indicates that Congress intended to permit the avoidance of private contracts as a sanction. Moreover, since no part of the money sought by El Salto from PSG represents payments barred by the antitrust laws, there is an even stronger

[1]The *Bruice's Juices* Court's remark that that the case law permitting a party to assert a Sherman Act violation as a defense to a contract suit "does not fit the Robinson-Patman Act," 330 U.S. at 756, was not, we feel, intended to preclude the application in Robinson-Patman Act cases of all principles derived from Sherman Act cases.

case for recovery here than in *Bruce's Juices, supra,* where part of the money sought by the seller represented an illegal differential in the price of goods. We conclude that PSG may not assert a violation of §2(c) of the Robinson-Patman Act as a defense to El Salto's common law contract action, since granting recovery to El Salto for the price of goods it actually sold to PSG would not promote an illegality forbidden by the antitrust laws.

In case No. 23,708, judgment is affirmed.

II. *Case No. 23,715*

After a special jury finding that Greenberg was not personally liable for the debts of PSG, the District Court refused to "pierce the corporate veil" of PSG Co. El Salto has appealed from this ruling. It advances two grounds for rejecting the District Court's conclusion and holding Greenberg personally liable.

First, El Salto argues that since it dealt with Greenberg personally and relied on him personally, and since it has sued Greenberg directly as well as in his derivative capacity, judgment should have been entered against Greenberg as an individual. We find this argument meritless. The trial court's instructions made it clear that the jury should find Greenberg individually liable for the obligations of PSG Co. if it found that El Salto contracted directly with Greenberg in his individual capacity.

El Salto's second argument is that the facts of this case establish that PSG was the alter ego of Greenberg and that Greenberg should therefore be held derivatively liable for the debts of PSG. El Salto

asserts that Greenberg organized PSG solely for tax purposes; that he failed to keep separate sets of books for himself and the corporation; that he owned all of the corporation's stock and was its principal officer; that he personally participated in or ordered all the transactions complained of; and that refusal to hold Greenberg personally liable would promote injustice.

The circumstances of this case, however, do not in our view warrant a reversal of the District Court's determination that PSG was not the alter ego of Greenberg. In and of itself, the fact that Greenberg may have organized PSG to secure tax advantages is not significant in the determination of whether the corporate veil of PSG Co. should be pierced. *See Schenley Distillers Corp. v. United States,* 326 U.S. 432, 437 (1946). The mere fact that Greenberg was the sole stockholder of PSG does not by itself make him the alter ego of the corporation. *See Bass v. Shutan,* 259 F.2d 561, 562 (9th Cir. 1958). While Greenberg kept no formal individual books of account separate from those of PSG, he prepared his individual income tax returns from original records and there was evidence to show that he had his own assets and liabilities and transacted his own affairs separately from PSG. Moreover, there is no allegation in this case that PSG Co. was an obviously undercapitalized corporation.[2] We do not feel compelled on this record to conclude that the District Court erred in determining that PSG Co. was not the alter ego of Greenberg.

In case No. 23,715, judgment is affirmed.

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[2] *Compare Anderson v. Abbott,* 321 U.S. 349, 362 (1944).

III. *Case No. 23,709*

In this case defendant Greenberg asks reversal of the District Court's judgment taxing him $120 costs and attorney's fees for his failure to appear in response to El Salto's post-judgment attempt to take his deposition pursuant to Rule 69 of the Federal Rules of Civil Procedure.

After the District Court had entered judgment against PSG and had dismissed all claims against Greenberg personally, El Salto notified Greenberg that it wished to examine him as a judgment debtor. Greenberg refused to attend. On this appeal he contends that the District Court's judgment taxing him $120 costs and attorney's fees for his failure to appear was erroneous because he had not received a subpoena and because he could not be examined as a judgment debtor after the District Court had dismissed all claims against him personally.[3]

While Rule 69(a) permits a judgment creditor to examine "any person," mere notice to attend is insufficient to compel the attendance of a person not a party; a subpoena is required. *See, e.g., Sunbeam*

[3]We reject Greenberg's contention that the notice to appear was improper under Rule 62(a) of the Federal Rules of Civil Procedure, which bars proceedings taken for the enforcement of a judgment until the expiration of 10 days after its entry. Judgment against PSG was entered on August 16, 1967. Although the notice sent to Greenberg on August 20th was invalid under Rule 62(a), Greenberg was given a new, valid notice dated August 28, 1967. We also reject Greenberg's suggestion that the attempted examination was barred by El Salto's failure to comply with Oregon State procedural rules. A judgment creditor proceeding under Rule 69(a) may utilize either state practice or the Federal Rules for taking depositions. *See Burak v. Scott*, 29 F.Supp. 775, 776 (D.D.C. 1939); 7 Moore's Federal Practice, par. 69.06, p. 2421 (1970).

Corp. v. Payless Drug Stores, 113 F.Supp. 31, 46 (N.D. Cal. 1953); *Fruit Growers Co-op v. California Pie & Baking Co.,* 3 F.R.D. 206, (E.D.N.Y. 1942). Since Greenberg was not subpoenaed, and since he was not a party after El Salto's claims against him in his individual capacity had been dismissed, the notice sent to him was insufficient to compel his attendance as an individual.

We reject the argument that El Salto sought to examine PSG, the judgment debtor, through its sole corporate officer, Greenberg. The notice sent to Greenberg was not proper notice to an officer through whom the deposition of a corporation is sought, since it did not purport to seek Greenberg's deposition in his capacity of officer or managing agent of PSG. *See* Rule 30(s) of the Federal Rules of Civil Procedure; Note, *Discovery Against Corporations Under the Federal Rules,* 47 Iowa L.Rev. 1006, 1014-16 (1962). Sanctions cannot be imposed on a corporation for the failure of its officer to appear when he was served with notice only in his individual capacity. *See Gillam v. A. Shyman, Inc.,* 22 F.R.D. 475 (D.Alaska 1958). *See also Pioche Mines Consolidated, Inc. v. Dolman, Janney v. Dolman,* 333 F.2d 257 (9th Cir. 1964). It would be anomalous to impose sanctions on Greenberg when it was the corporation's deposition that was sought and sanctions could not be imposed on the corporate party itself.

In case No. 23,709, judgment is reversed.

No costs are awarded.

Appendix B

United States Court of Appeals
for the Ninth Circuit

El Salto, S.A., Escuintla, Guatemala, C.A., *Plaintiff-Appellee,* vs. PSG Co., *Defendant-Appellant.*	No. 23,708
El Salto, S.A., Escuintla, Guatemala, C.A., *Plaintiff-Appellee,* vs. Philip S. Greenberg, *Defendant-Appellant.*	No. 23,709
El Salto, S.A., Escuintla, Guatemala, C.A., *Plaintiff-Appellant,* vs. Philip S. Greenberg, *Defendant-Appellee.*	No. 23,715

[June 16, 1971]

Order On Petition for Rehearing

Before: Hamley and Merrill, Circuit Judges, and Thompson, District Judge*

Rehearing is denied.

*Honorable Bruce R. Thompson, United States District Judge for the District of Nevada, sitting by designation.

The opinion on file herein is modified in the following respect:

The paragraph appearing at lines 5 through 11 of page 4 of the typewritten opinion, being the second paragraph from the bottom of page 3 of the slipsheet printing, is stricken and the following two paragraphs are inserted in lieu thereof:

We find no error in the District Court's determination of liability. On appeal, PSG contends that the District Court erroneously foreclosed argument on factual disputes surrounding the Robinson-Patman Act claim by ordering judgment before trial; that the agreed facts before the court at the time it ordered judgment fail to establish that PSG was a buyer or that commissions had actually been paid to PSG; and that the District Court's procedure improperly deprived PSG of a jury trial.

We do not agree. The District Court made findings of fact and entered judgment on the Robinson-Patman Act claim after the trial, not before. The court's pretrial ruling merely declared that, on the record at that time, there was a Robinson-Patman Act violation as a matter of law. The District Judge did not then limit the fact issues to be tried or in any way curtail defendant's proof. The agreed facts and the facts later adduced at trial adequately established that PSG acted as a buyer and that it received commissions from El Salto. We find no support in the record for PSG's contention that it attempted to reserve some factual issues for the jury. Rather, the record shows that PSG explicitly waived its right to jury trial on the Robinson-Patman Act claim.

Appendix C

P S G Co.
607 Executive Bldg.
Portland, Oregon 97204

Telephone 220-0500
Telex: 036-759
Cable Address: PSGCO

PRIVATE CONTRACT

1. *SUBJECT.* PSG Co. is appointed El Salto, S.A.'s sole and exclusive sales agent for refined sugars, raw sugars and green coffee to be exported to the U.S.A. and world markets by El Salto, S.A.

2. *TERM.* The term of this contract covers the 1965/66, 1966/67, 1967/68 and 1968/69 crop years.

3. *COMMISSION.* For services rendered by PSG Co. to El Salto, S.A., El Salto, S.A. agrees to pay to PSG Co. a commission of two and one-half percent (2½%) in U.S. dollars of the sales price FOB stowed Guatemala for sugars and coffees covered under this contract. Notwithstanding, the minimum fee due PSG Co. for services rendered to El Salto S.A. per crop year shall be U.S. $25,000. payable within thirty days after termination of each crop year but no later than August 1 of said year.

4. This Contract and the determination of the rights of the parties involved will be governed by the laws of the Republic of Guatemala and those

of the State of Oregon, United States of America.

In Faith Of Which we sign the present contract in triplicate at Nassau, Bahamas the 19th of August, 1965. Copy of this Contract is being held by each of the persons signing below.

For PSG Co.
/s/ Philip S. Greenberg
Philip S. Greenberg
President

For El Salto, S.A.
/s/ Robert C. Dorion
Robert C. Dorion
President

Appendix D

P S G Co.
607 Executive Bldg.
Portland, Oregon 97204

Telephone 220-0500
Telex: 036-759
Cable Address: PSGCO

PRIVATE CONTRACT

Subject:	Contracting for a minimum of 6,000 bags (150 lbs. net) El Salto, S.A. Prime Washed Guatemalan coffee of the 1965/66 crop.
Seller:	El Salto, S.A., 4a Avenida 13-65 Zona 1, Guatemala City, Guatemala.
Buyer:	PSG Co., 607 Executive Bldg., Portland, Oregon as sole and exclusive agent in the U.S.A. of and for the account of El Salto, S.A., Guatemala City, Guatemala.
1. Packaging:	Coffee must be packed in bags of uniform size made of sisal, henequen, jute, burlap or similar woven material without inner lining or outer covering of any other material.
2. Shipment:	Beginning October, 1965 through March 1966 from either East Coast or West Coast Guatemalan seaports to the U.S.A. at the option of PSG Co., Portland, Oregon.
3. Delivery:	Seller agrees to have the full quantity of this contract available for

shipment from Guatemalan seaports on or before January 15, 1966.

4. Marine Insurance: Seller will assume insurance costs for coffee until aboard vessel or vessels. Ocean insurance after stowing the coffee on vessel or vessels for account of Buyer.

5. Price: The price of the green coffee covered in this contract shall be determined no later than ten days prior to shipment with the Buyer's option, to price any time after May 1, 1965 at his discretion a maximum of 50% of the coffee covered by this contract.

6. Payment: Payment for coffee to apply against $300,000.00 advance made by PSG Co. to El Salto, S.A. until such advance, and interest due, has been liquidated. Balance of funds after liquidation of $300,000. advance, less commission and expenses, to be remitted to El Salto, S.A. upon completion of contract. All payments to be made in United States currency, New York Funds, on landed weights. All weighing expenses for the account of the Seller. Coffee to be weighed within 15 calendar days after discharge of the coffee from the vessel at port of discharge.

7. Commission: El Salto, S.A. shall pay to PSG Co. for its services as its sole coffee agent in the U.S.A. 2½% of the net sale price FOB stowed Guatemala of the coffee sold under this contract.

In Faith Of Which we sign the present Contract in duplicate, at Guatemala the thirtieth day of April, 1965. Copy of this Contract is being held by each of the persons signing below.

Seller;
/s/ Robert C. Dorion

El Salto, S.A.
Robert C. Dorion,
President

Buyer, As Agent:
/s/ Philip S. Greenberg

PSG Co.
Philip S. Greenberg,
President

Appendix E

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Thurman Arnold
William D. Rogers
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El Salto, S.A.

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1200 Jackson Tower
Portland, Oregon 97205
Telephone: AC 503--227-0537

Attorneys for Defendants

United States District Court
for the District of Oregon

Civil No. 67-346

El Salto, S.A.,
Escuintla, Guatemala, C.A.
Plaintiff,

v.

Philip S. Greenberg
607 Executive Building
Portland, Oregon 97204
PSG Co.
607 Executive Building
Portland, Oregon 97204,
Defendants.

JUDGMENT

This matter came on regularly for trial on July 30, 1968, and continued through August 2, 1968, before the Honorable Robert C. Belloni. Plaintiff appeared by Robert C. Dorion, its President, and Bernardo Neumann, its Assistant Manager, and by William D. Rogers and Clifford N. Carlsen, Jr., of its attorneys. Defendant Philip S. Greenberg appeared in person and by his attorney, William F. White, and defendant PSG Co. appeared by Philip S. Greenberg, its President, and by William F. White, its attorney.

Prior to the impaneling of the jury, the court considered plaintiff's motion for a judgment on its Rob-

inson-Patman Act claim as a matter of law based on the Agreed Facts. Arguments were made, following which the court orally ruled in plaintiff's favor on such claim and made and entered its findings of fact and conclusions of law with respect thereto.

The jury was impaneled and heard the testimony of the parties bearing upon the remaining issues in this cause. Thereafter the jury heard the instructions of the court and retired with those instructions in written form to deliberate upon its verdict upon the special interrogatories submitted to it.

The jury returned into open court and presented its verdict upon such special interrogatories in words and figures as follows:

Special Issue No. 1:

What was the amount defendant PSG retained on the coffee contracts?

(Fill in the amount retained.)

$105,286.61.

Special Issue No. 2:

Did Greenberg unjustifiably retain $2,187.39 on coffee sale 3?

Answer "yes" or "no."

Answer: Yes.

Special Issue No. 3:

Did the agreement of August 19, 1965, supersede and nullify the April 30, 1965, agreement?

Answer "yes" or "no."

Answer: Yes.

Special Issue No. 4:

Was there an advance of $300,000 made by PSG to El Salto prior to April 30, 1965?

Answer "yes" or "no."

Answer: No.

Special Issue No. 5:

Did the April 30, 1965, agreement refer to that advance?

Answer "yes" or "no."

Answer: ——

Special Issue No. 6:

(a) Is defendant PSG estopped from claiming a right to withhold by having issued a $69,972.48 check in partial payment of the sums allegedly withheld?

Answer "yes" or "no."

Answer: Yes.

[*Answer §(b) only if your answer to 6(a) is "No."*]

(b) Was that check an admission that defendant had no right to withhold coffee payments?

Answer "yes" or "no."

Answer: ——

Special Issue No. 7:

Did the agreement of August 19, 1965, supersede the agreement of May 10, 1965?

Answer "yes" or "no."

Answer: Yes.

[*Answer # 8 only if your answer to # 7 is "No."*]

Special Issue No. 8.

(a) If not, did defendant PSG perform the May 10, 1965, agreement and did plaintiff breach it?

[Note: If your answer is "yes" to *both* parts of (a), answer "yes" in the blank provided. If your answer is "no" to *either* or both parts, answer "no."]

Answer "yes" or "no."

Answer: ——

(b) If so, what damages did PSG sustain:

(Fill in amount of damages.)

Amount: $ ——.

[*Answer # 9 only if answer to special Issue # 3 is "No."*]

Special Issue No. 9:

(a) Did Greenberg undertake obligations as agent to El Salto under the contract of April 30, 1965?

Answer "yes" or "no."

Answer: ——

(b) If so, did Greenberg breach these obligations as agent to El Salto?

Answer "yes" or "no."

Answer: ——

[*Answer # 10 only if answer to # 7 is "No."*]

Special Issue No. 10:

(a) Did Greenberg undertake obligations as agent to El Salto under the contract of May 10, 1965?

Answer "yes" or "no."

Answer: ——

Recall instruction above in # 9.

(b) If so, did Greenberg breach these obligations as agent to El Salto?

Answer "yes" or "no."

Answer: ——

Special Issue No. 11:

(a) Did Greenberg undertake obligations as agent to El Salto under the contract of April 30, 1965?

Answer "yes" or "no."

Answer: Yes.

(b) If so, did Greenberg breach those obligations as agent to El Salto?

Answer "yes" or "no."

Answer: Yes.

Special Issue No. 12:

The PSG Co. assigned its rights under the contract of August 19, 1965, to the Amerop Corporation. Did it do so without the consent or ratification of the plaintiff?

Answer "yes" or "no."

Answer: Yes.

Special Issue No. 13:

Is Greenberg liable for debts of PSG?

Answer "yes" or "no."

Answer: No.

VERDICT OF THE JURY

We, the jury, have answered the above and foregoing special issues, as herein indicated, and herewith return the same into court as our verdict.

Dated this 2nd day of August, 1968.

Delbert Bjork
Foreman

Based thereon, it is hereby

Ordered And Adjudged that plaintiff have and recover of and from defendant PSG Co. the sum of $15,176.13 and the sum of $..... for attorneys' fees upon plaintiff's Robinson-Patman Act claim herein, and it is further

Ordered And Adjudged that plaintiff have and recover of and from defendant PSG Co. the further sum of $131,477.88, and it is further

Ordered that plaintiff recover of and from defendant PSG Co. plaintiff's costs herein incurred, taxed in the sum of $....., and that execution issue for the sums hereby severally awarded.

Dated this 13th day of August, 1968.

Robert C. Belloni
Judge

Filed August 16, 1968,
U.S. District Court, District of Oregon,
Donald Sullivan, Clerk.

OCT 6 1971
ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1971

No. 71-351

PSG Co., an Oregon corporation,

Petitioner,

—vs.—

EL SALTO, S.A., Escuintla, Guatemala, C.A.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

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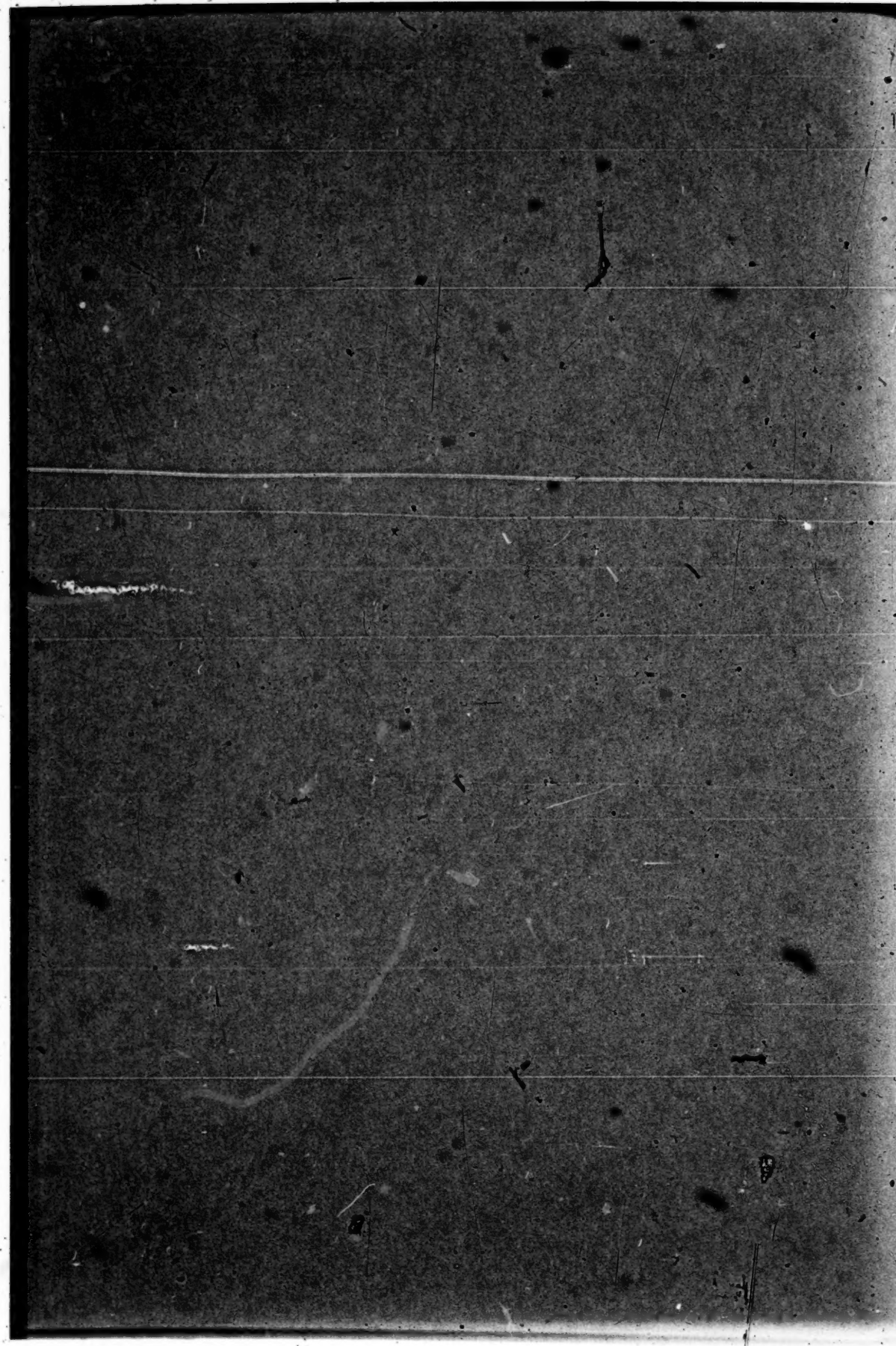

IN THE

Supreme Court of the United States

OCTOBER TERM 1971

No. 71-351

PSG Co., an Oregon corporation,

Petitioner,

—vs.—

EL SALTO, S.A., Escuintla, Guatemala, C.A.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

In 1965, PSG Co., a Portland, Oregon, firm, secured appointment as the exclusive agent for El Salto, S.A., a Guatemalan coffee and sugar producer, to sell El Salto's products in the United States at a commission of 2½%. During 1966 and early 1967, under this arrangement, El Salto shipped 400,000 pounds of coffee.

At the time, Philip Greenberg, PSG's principal, was also speculating in the commodity futures market. His fortunes took a turn for the worse. So he helped himself to the proceeds of the El Salto coffee sales.[1] El Salto demanded

[1] As well as to a quarter million dollars of the proceeds of sugar sales of the Guatemalan Sugar Association, for which he was also agent. *See* Asociacion de Azucareros de Guatemala v. United States National Bank of Oregon, 423 F.2d 638 (9th Cir. 1970).

A third dispute to emerge from the ruins of Greenberg's financial ambitions was, incidentally, PSG Co. v. Merrill/Lynch, Pierce, Fenner & Smith, Inc., 417 F.2d 659 (9th Cir. 1969), *cert. denied* 397 U.S. 918 (1970).

payment. Greenberg wrote a check in partial payment. The check bounced. El Salto sued.

El Salto's suit was principally to recover some $100,000 of coffee payments. El Salto also put forward three smaller claims, one of which was for $5,058.71 of agency commissions, trebled, under Section 2(c) of the Robinson-Patman Act, because PSG had acted as both buyer and agent on the coffee sales. Petitioner now challenges the adverse result below on four grounds. Two of the alleged errors concern trivial questions of state contract and parol evidence law; the other two concern peripheral aspects of the Robinson-Patman Act determination.

1. The Oregon law questions Petitioner raises are whether the supersession of one contract by another is a jury question (Petitioner says never) and whether a jury can consider oral testimony explaining an otherwise vague contractual recitation (Petitioner says not in Oregon).

The two questions are decisively questions of local law. It is absurd to argue they are worthy of this Court's time. Furthermore, both were argued to the District Court and to the Circuit Court. Both Courts ruled against Petitioner. And both Courts were right. Indeed, the Ninth Circuit found Petitioner's position on supersession so devoid of merit that it did not even discuss the issue.

The parol evidence question related to a contract which both the District Court and the jury found had been superseded. So that question is moot. And in any event, the alleged error comes down to whether the trial judge erred in admitting certain testimony. Petitioner had explained at length his version of the transactions, but he objected when an official of Respondent sought to do the same thing. It

was not error to admit that testimony. As the Ninth Circuit said, "the challenged testimony did not contradict the terms of the April 30th agreement." It explained that contract. The jury's answer to Special Issue No. 4 settled the matter.

2. The Robinson-Patman questions Petitioner raises are whether a buyer-agent lucky enough to be caught violating Section 2(c) can pocket the proceeds of the sale (Petitioner says seller is barred from recovering the purchase price of his own goods) and whether the trial judge violated the Seventh Amendment by deciding the Robinson-Patman issue of law (Petitioner says he did).

As to the first point, Petitioner argues El Salto cannot also recover the purchase price of its coffee because El Salto won on the Robinson-Patman Act issue. Petitioner suggests that its violation of Robinson-Patman made the sales contract "illegal"—in short, that Petitioner is to be rewarded with $100,000 of coffee sales proceeds because Petitioner violated the Robinson-Patman Act.

Unfortunately, the law does not provide for such a happy windfall for those who violate it. PSG undertook a fiduciary responsibility as agent for a foreign seller. It then turned its back on its duties as agent, bought the goods in its own name and made a profit for its own account. This was wrong. That wrong does not excuse PSG from paying for the goods. *Bruce's Juices, Inc.* v. *American Can Co.*, 330 U.S. 743, 752 (1947), squarely holds that a seller can sue for the price of the goods he has sold, even though seller may have violated Robinson-Patman in the transaction. *A fortiori* here, where it is not the seller but the buyer who violated the Act.

Finally, Petitioner argues that it was denied a jury trial on the Robinson-Patman claim. It does not say that the Robinson-Patman issue was decided wrongly. It does not deny that it acted as both agent and principal on the sale of the El Salto coffee. It does not deny that it sold the coffee for its own account and that it also took a commission for itself. It does not say that it did not violate the Act. It claims only that these facts—which were never in dispute—were somehow not before the trial court.

PSG's dual agent-buyer status was agreed to by the parties before the trial, and was plain on the face of the stipulated exhibits submitted to the court. There was never any question as to the facts.[2] The amount of the commission which PSG took on sales to itself was also stipulated (Tr. 367). In short, as the Court of Appeals found, there was no real issue for the jury to decide, and Petitioner's counsel at the time never tried to frame one. There remained only the task of applying the law to those facts.

The court decided the law on the uncontested facts. (And correctly, at that; the case presents no issue of general substantive law.) We had understood this to be a trial judge's responsibility.

---

[2] Even after the trial, in its post-trial brief, Petitioner again admitted what had been palpable from the beginning—that it was agent and was also buying the coffee to its own account. It said, "PSG was appointed 'exclusive sales agent,'" and "the confirmations of purchase set forth in agreed facts so far as PSG Co. was concerned were all direct purchases by PSG Co." (R. 88).

It is understandable that present counsel is puzzled as to what happened below. He is the fourth lawyer to represent Petitioner in the swirl of litigation arising out of Greenberg's financial collapse.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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October 6, 1971

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Certificate of Service

I hereby certify that on this sixth day of October, 1971 three copies of the foregoing Brief of Respondent in Opposition were mailed, air mail, postage prepaid, to Arthur H. Connolly, Jr., 20th Floor—Mills Tower, 220 Bush Street, San Francisco, California 94104, Attorney for Petitioner. I further certify that all parties required to be served have been served.

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Supreme Court, U.S.
FILED
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In the Supreme Court

OF THE

United States

OCTOBER TERM 1971

No. 71-351

PSG Co., an Oregon Corporation, *Petitioner*

vs.

EL SALTO, S.A., Escuintla, Guatemala, C.A.,
Respondent

PETITIONER'S REPLY BRIEF

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In the Supreme Court
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OCTOBER TERM, 1971

No. 71-351

PSG Co., an Oregon Corporation,
Petitioner,

vs.

EL SALTO, S.A., Escuintla, Guatemala, C.A.,
Respondent.

PETITIONER'S REPLY BRIEF

I.

INTRODUCTION

Pursuant to Rule 24 of the Supreme Court Rules, Petitioner PSG Co. presents herewith its reply to the "Brief of Respondent in Opposition" to our Petition for Writ of Certiorari.

Respondent's brief fails to comply with Rule 40 of the Rules of this Court in that it has no logical ordering or arrangement or topical headings; this reply to that brief therefore must attempt to extract from

Respondent's discursive invective, whatever comments, wherever found, which seem to have some actual relevance to the questions brought before this Court by the instant petition.

Since Respondent's brief is further in violation of Rule 40 of this Court in failing to support its alleged statements of "fact" with references to the record we are compelled to trouble this Court with refutations of the same, with proper record references, where important.

II.

JURY TRIAL

Our Petition for Writ of Certiorari (pp. 7-16) argued that Petitioner was denied its fundamental constitutional right to a jury trial; that the trial court erred grievously when, prior to the trial, it ordered judgment in favor of Respondent, El Salto, on the Robinson-Patman claim; that the Court of Appeals erred, first, in affirming such order on the basis of a pre-trial stipulation, and, secondly, compounded the error in its amended decision by affirming such judgment on the basis of evidence introduced during the trial. We there cited a host of decisions of this Court and of other Courts of Appeals in conflict with such decision.

If we understand correctly, Respondent's answer (p. 4) seems to be that the decision was right because "there never was any question as to the facts." Respondent thus delicately avoids the heart of the mat-

ter, namely, that the trial court disposed of this issue BEFORE trial, so that there never was any opportunity to present facts on the point. In our petition for Writ of Certiorari (pp. 14-16) we itemized the *host* of factual issues concerning the Robinson-Patman claim which were before the Court at the time it ordered judgment; not one word concerning any of them appears in Respondent's brief.

Respondent's brief (p. 4) glibly asserts:

> "PSG's dual agent-buyer status was agreed to by the parties before the trial * * *."

Respondent does not favor us with a reference to the record to support this remarkable statement; plainly and simply, it is not so. The facts to the contrary on the point, each of which *is* supported by references to the record, are carefully set forth in our Petition for Writ of Certiorari at pp. 13-16; not one word concerning any of them appears in Respondent's brief.

Respondent's brief (p. 14) asserts:

> "In short, as the Court of Appeals found, there was no real issue for the jury to decide * * *."

Again, no record reference appears to support the statement. The fact is to the contrary. The Court of Appeals found that the issue was resolved during trial as a contested issue on evidence introduced during the trial. In its Order on Petition for Rehearing (See our Petition for Writ of Certiorari, p. xiv) the Court of Appeals said:

> "The agreed facts *and the facts later adduced at the trial* adequately established that PSG acted as

a buyer, and that it received commissions from El Salto." (Emphasis added)

We respectfully submit that Respondent's brief, by its pointed omissions, corroborates our contention that the *pre-trial* Robinson-Patman judgment denied PSG Co. its right to a jury trial.

If the instant decision be allowed to stand, it will stand for, and be cited for, the proposition that a trial court may take from a jury whatever part of a case it wishes, even before any evidence whatsoever has been introduced.

III.

ILLEGALITY

Our Petition for Writ of Certiorari argued (pp. 16-18) that the instant decision erred in simultaneously awarding El Salto treble damages because the contract between the parties was allegedly in violation of the Robinson-Patman Act and, in addition, allowed El Salto full recovery on that contract. No authority allows such quadruple (treble plus one) recovery.

Respondent's brief (p. 3) cites no authority whatsoever to support the challenged decision. The *only* authority cited in Respondent's entire brief is that of *Bruce's Juices, Inc. v. American Can Co.*, 330 U.S. 743. That case allowed a relatively innocent seller to recover on a contract which violated Robinson-Patman; it did *not* permit the seller to recover, *on top of the contract price,* treble damages; the decision

clearly suggests that a party *cannot* have both remedies.

If the instant decision be allowed to stand, it cannot help but become authority for the rule that a contract in violation of Robinson-Patman will entitle one party to that contract to quadruple damages against the other, depending upon who sues first!

IV.

SUPERSESSION

Our Petition for Writ of Certiorari (pp. 18-19) argued that the trial court erred in submitting the question of supersession to the jury and that the Court of Appeals erroneously overlooked this point in its decision.

Respondent's brief (p. 2) confirms the fact that the Court of Appeals did not discuss or rule on this point, although it was there argued. On the merits, Respondent, in a grand manner, disposes of the same with the *sole* assertion that this is a matter of "local law."

While Respondent, a Guatemala corporation, may consider matters of "local law" as trivia, this Court not infrequently finds matters of "local law" not to be beneath *its* dignity.

V.

PAROL EVIDENCE

Our Petition for Writ of Certiorari (pp. 20-21) argued that the trial court erred in admitting parol evidence to vary the clear terms of a contract. That contract, of April, 1965 (Appendix D to our Petition for Writ of Certiorari), recited that El Salto was indebted to PSG Co. in the amount of $300,000.00; the trial court permitted El Salto's president to testify that there was no such debt (Tr. 413-414) upon the specific ground that PSG Co.'s president had been permitted to testify concerning antecedent transactions and that, therefore, El Salto should be permitted to do so.

The Court of Appeals affirmed the ruling on a totally different ground (Appendix A to our Petition for Writ of Certiorari, p. vi) namely, that of alleged "latent ambiguity" in the said April contract. In our Petition for Writ of Certiorari (pp. 20-21) we contended that the acknowledgment of indebtedness was so clear as to preclude any possibility of ambiguity.

Respondent's brief (p. 2) argues that the point is moot because the District Court and the jury found that the contract had been superseded. Again, no citation to the records is given to support the statement. We are unaware of *any* factual determinations made by the trial court, other than the Robinson-Patman decision, discussed above. The jury *did* find, with regard to the said April contract, that Petitioner *did undertake obligations thereunder* (R. p. 102, lines 23-26).

Respondent's brief (p. 3) concludes on this point with the remark that "the jury's answer to Special Issue No. 4 settled the matter", i.e., the jury's finding (R. p. 100, lines 27-31) that there had been no $300,000.00 advance made. That jury verdict, however, rests upon the very testimony that is here being challenged. Respondent's argument that the evidence is admissible because the jury found in accordance with that evidence is an extraordinary one indeed, but demonstrates rather graphically the absence of any valid support for the decision.

VI

CONCLUSION

Apart from the obvious economic individual consequences to Petitioner from the instant decision of the Court of Appeals, we respectfully submit that the said decision, if allowed to stand, would have consequences reaching far beyond the instant litigation.

As noted above, the said decision would inevitably be cited in the future as authority for at least two fundamental points: 1. A trial court may, without any motion being before it, take from the jury whatever part of a case it chooses, even prior to the introduction of any evidence whatsoever in the case. 2. Either party to a contract which is in violation of the Robinson-Patman Act may, without reference to the extent of "guilt" recover quadruple damages from the other party—depending only upon who sues first!

We respectfully submit that such "rules" do violence to the basic principles of law on the subject heretofore established by this Court and the Courts of Appeals. In our Petition for Writ of Certiorari we cited a number of such decisions. Respondent's reply ignores those decisions, for obvious reasons.

We respectfully urge this Court to grant the writ as prayed.

Dated, San Francisco, California,
October 13, 1971.

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